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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ROY WALKER, *Petitioner*

v.

SOUTHERN RAILWAY COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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No. 89

ROY WALKER, *Petitioner*

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SOUTHERN RAILWAY COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Does Federal or state law determine whether an employee of a railroad who claims damages from his employer for violation of a collective bargaining agreement must exhaust the remedies provided by the agreement and the Railway Labor Act before seeking judicial redress?

2. Assuming that Federal law applies, does Federal law require exhaustion of contractual (or contractual and administrative) remedies prior to filing suit?

STATEMENT

From 1944 until March 3, 1957, petitioner worked intermittently as a fireman for respondent. During the period of petitioner's employment, he and respondent's other firemen were represented by the Brotherhood of Locomotive Firemen and Enginemen, a labor union. The terms and conditions of petitioner's employment were governed by the provisions of the collective bargaining agreement between the union and respondent. Petitioner has conceded that his cause of action in this proceeding is based exclusively on the collective bargaining agreement and that he had no common law employment contract. R. 67-68.

On March 3, 1957, petitioner was displaced on his job by another fireman because of the latter's higher seniority. Under the collective bargaining agreement, when an employee is displaced for this reason, he is required within six days "to place himself" in employment to which his seniority entitles him. When petitioner was displaced on March 3, 1957, he could have "placed himself" in employment by "marking up" for the so-called "extra board." R. 40. Petitioner did not do this even though it would only have entailed advising a clerk in respondent's local office to place petitioner's name on the extra board. R. 41. Instead, when petitioner left the respondent's premises on March 3, 1957, he simply stated to a crew clerk that he was sick and was going home. R. 40. Petitioner did not advise any of his superiors that he was going home or that he was sick. R. 40-41.

Six weeks passed and respondent still had no indication from petitioner whether he desired to continue in the employ of respondent. Accordingly, on April 29,

1957, respondent's Division Superintendent wrote the following letter to petitioner:

> "I understand you were displaced from a regular job at Air Line Junction, March 3, 1957 and have idled yourself since.
>
> "This is to advise you that you stand for work on your seniority and unless you protect your seniority standing within 30 days from the date of this letter, you will have forfeited your seniority." (D. Ex. 1; R. 5)[1]

A copy of this letter was simultaneously forwarded to petitioner's local union representative, and the letter itself was delivered to petitioner's home the following day. D. Ex. 2; R. 5-6, 43. Petitioner actually saw the letter three or possibly four days after that. R. 41-42.

As of midnight on May 28, 1957, petitioner had failed to protect his seniority and respondent accordingly treated it as having been forfeited. A letter to this effect was mailed from Greenville, South Carolina, to petitioner by respondent's superintendent on May 30, 1957. D. Ex. 3; R. 68. On the preceding day, May 29, 1957, petitioner had appeared at respondent's office in Charlotte, North Carolina, seeking to protect his seniority, but was advised that it had been terminated at midnight on May 28, 1957, by reason of his prior inaction.

Petitioner then complained to the Brotherhood of Locomotive Firemen and Enginemen about the loss of

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[1] Art. 25(e)(3) of the applicable collective bargaining agreement provided:

> "When hired engineers or firemen are laid off on account of reduction in service, they will retain all seniority rights; provided, they return to actual service within thirty (30) days from the date their services are required." (R. 29)

his seniority. Petitioner concedes, however, and the District Court specifically found, that he neither pursued the contractual grievance procedure to its conclusion nor attempted to have the matter considered by the National Railroad Adjustment Board; *i.e.*, that he did not exhaust his contractual or administrative remedies. Pet. Br. 6; R. 22, 46.

On August 23, 1957, notwithstanding petitioner's failure to pursue the grievance procedure, respondent's Director of Labor Relations wrote a letter to the General Chairman of the Brotherhood of Locomotive Firemen and Enginemen, setting forth the salient facts regarding the termination of petitioner's seniority and asked the union's position. Specifically, the union was asked whether, as it interpreted the collective bargaining agreement, petitioner had forfeited his seniority because of failure to report for work in conformity with the notice he received from respondent's Division Superintendent, or whether petitioner's name should be restored to the seniority roster because of the evidence that he had been receiving medical care during the period in question. A copy of this letter, which was defendant's Exhibit No. 4 in the District Court, is reproduced at page A-1 of the Appendix to this brief.

On September 16, 1957, the General Chairman of the union replied. His letter recognized that petitioner's reporting for work on May 29, 1957, did not constitute a return to work within 30 days. The General Chairman stated:

> "Mr. Walker did not return within the 30 days and his name was subsequently removed from the list."

The General Chairman's reply noted that petitioner had not even advised respondent of his situation during the period he was given to return to service. The General Chairman also stated that it appeared that petitioner's claim was barred from further processing under the collective bargaining agreement because petitioner had failed to comply with the requirements of the grievance procedure provision, Article 32(b).

For all of these reasons, the union concurred in the Company's position that petitioner's seniority had properly been terminated. A copy of the General Chairman's letter of September 16, 1957, which was defendant's Exhibit No. 5 in the District Court, is reproduced at page A-3 of the Appendix to this brief; Article 32 of the collective bargaining agreement (R. 33-34) is reproduced at page A-4 of the Appendix.

On August 15, 1963, more than six years after the termination of his seniority, petitioner instituted this suit to recover damages for breach of contract and reinstatement. Petitioner subsequently abandoned his claim for reinstatement, and the District Court accordingly dismissed that portion of his complaint. As for the damage claim, however, the District Court awarded petitioner damages in the amount of $4,500, holding *inter alia* that his failure to exhaust his contractual and administrative remedies did not bar his court action.

The basis for the District Court's holding was this Court's decisions in *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653 (1953), *Slocum* v. *Delaware, L. & W. R. R. Co.*, 339 U.S. 239 (1950), and *Moore* v. *Illinois Central R. R. Co.*, 312 U.S. 630 (1941), holding that state law governs whether failure to ex-

haust contractual and administrative remedies bars an effort to recover damages in court, and the North Carolina Supreme Court's decision in *Haynes* v. *Winston-Salem Southbound Ry. Co.*, 252 N.C. 391, 113 S.E. 2d 906 (1960), holding that North Carolina law does not require exhaustion.

On appeal, the Court of Appeals reversed and ordered dismissal of the complaint on the ground that the rationale of this Court's decision in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), applied to suits on collective bargaining agreements enforceable under the Railway Labor Act as well as to suits on agreements enforceable under the Labor Management Relations Act. The *Maddox* case, decided after the District Court's opinion in the instant case, held that exhaustion of contract remedies is a prerequisite to suing in court.

SUMMARY OF ARGUMENT

I.

It is now clear that, in an employee suit for breach of a collective bargaining agreement covered by the Railway Labor Act, the rights of the parties are governed by Federal law, not state law. Accordingly, in the instant case, Federal Law governs whether the plaintiff must have exhausted his contractual and administrative remedies before filing suit.

The Federal rule, as announced in *Maddox*, is that an employee suing for violation of a collective bargaining agreement, must first exhaust his other remedies. The *Maddox* decision involved a contract under the Labor Management Relations Act, but there is no basis for declining to extend the rule there announced to suits on contracts covered by the Railway Labor Act.

Earlier decisions of this Court which referred the question of exhaustion of remedies to state law cannot be viewed as authoritative since they were based on the assumption, no longer valid, that state substantive law governed the rights of the parties.

II.

Nothing in the nature of the particular claim asserted here justifies departure from the *Maddox* rule. Nor is there anything in the scheme of the Railway Labor Act that would support the Court's applying a different rule from that followed in contracts subject to the Labor Management Relations Act.

Petitioner's suggestion that he would not get a fair determination of his rights from the National Railroad Adjustment Board is neither supported by evidence nor a basis for declining to apply the general Federal rule laid down in *Maddox*.

The policy reasons favoring exhaustion of remedies in the area covered by the Labor Management Relations Act are equally applicable to the railroad and airline industries. In this connection, the arbitration procedures established by the Railway Labor Act are substantially similar to those provided in the typical collective bargaining agreement subject to the Labor Management Relations Act.

III.

No constitutional objections to the application of *Maddox* are properly before the Court. In any event, contrary to petitioner's insistence, extension of the *Maddox* rule to cases arising out of contracts under the Railway Labor Act would not deny him equal protection of the law or deprive him of a right guaranteed by the Seventh Amendment.

IV.

Nor could there be any possible justification for this Court's extending the *Maddox* rule to employee suits for breach of a collective bargaining agreement covered by the Railway Labor Act while at the same time giving its decision only "prospective" application and declining to apply the rule to the instant controversy.

ARGUMENT

I. The Rationale of the Maddox Decision Clearly Applies to Suits for Breach of Collective Bargaining Agreements Under the Railway Labor Act.

This Court held in *Maddox* that Federal law, not state law, governs whether an employee suing for breach of a collective bargaining agreement under Section 301 of the Labor Management Relations Act must first exhaust his contractual and administrative remedies. The Court rejected the plaintiff's argument that its earlier, inconsistent rulings in *Slocum, Koppal* and *Moore,* involving contracts under the Railway Labor Act, should be followed. The Court stated:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. [footnote omitted] . . . [U]nless the contract provides otherwise [footnote omitted], there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant." 379 U.S. at 652-53.

In *Maddox*, the Court expressly refrained from overruling *Slocum, Koppal* and *Moore* to permit future consideration of such action in a case arising under the Railway Labor Act. But both the logic and language of *Maddox* compel the conclusion that, even under the Railway Labor Act, *Slocum; Moore* and *Koppal* can no longer be regarded as stating the applicable law with respect to exhaustion of remedies. As the Court made clear in *Maddox*, the basis for the rule in *Moore* and *Koppal* was the assumption that the sole basis for Federal jurisdiction in those cases was diversity of citizenship and the corollary assumption that the rights of the parties were governed by state law.

Insofar as collective bargaining agreements enforceable under the Labor Management Relations Act are concerned, the notion that state law could govern was laid to rest in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), which also made clear the responsibility of the Federal courts to fashion a consistent and comprehensive body of case law in implementation of national labor policy. Against this background, the Court in *Maddox* refused to apply the precedent of *Slocum, Moore* and *Koppal* and declared a Federal rule with respect to exhaustion of remedies. That rule requires an employee to exhaust his contractual and administrative remedies before attempting judicially to enforce rights under a collective bargaining agreement.

In declining to follow *Slocum, Moore* and *Koppal*, this Court went further in *Maddox* than merely holding those earlier decisions inapplicable. It intimated serious doubt as to their continued validity even with respect to contracts under the Railway Labor Act. It

pointed out that as *Lincoln Mills* had dispelled the notion that state law governed the rights of parties to contracts under the Labor Management Relations Act, the Court's subsequent decision in *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963), dispelled the notion with respect to contracts under the Railway Labor Act.

As the Court noted—

> "Federal jurisdiction in both *Moore* and *Koppal* was based on diversity; federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act. Since that time the Court has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by § 204 of the Railway Labor Act, *International Assn. of Machinists* v. *Central Airlines, Inc.* 372 U.S. 682, and by § 301(a) of the LMRA, [Labor Management Relations Act] *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448. *Thus a major underpinning for the continued validity of the* Moore *case in the field of the Railway Labor Act, and more importantly in the present context, for the extension of its rationale to suits under § 301(a) of the LMRA, has been removed.*" 379 U.S. at 655 (Emphasis added.)

In *Central Airlines*, the case that removed the "major underpinning" of *Moore* and *Koppal* in the field of the Railway Labor Act, the issue had been whether a suit to enforce an arbitration award by a system board of adjustment could be brought in a Federal district court in the absence of diversity of citizenship. The lower courts said no. This Court reversed, holding that Federal jurisdiction existed with-

out diversity of citizenship because Federal substantive law governed the rights of the parties.

The major policy consideration expressed in *Central Airlines* was the need for uniformity in the resolution of questions arising under contracts covered by the Railway Labor Act. The Court also adverted to the Congressional desire for resolution of disputes arising under collective bargaining agreements without strikes.[2]

Although the issue in *Central Airlines* arose under Title II of the Railway Labor Act because the defendant was an airline, the rationale of the decision is equally applicable to Title I, which covers collective bargaining agreements entered into by railroads. Both titles establish essentially the same rights and obligations with respect to the carriers and unions covered by each.

In *Maddox,* this Court said that application of state law to the question of exhaustion of remedies in contract suits arising under the Labor Management Relations Act is "incompatible with the precepts of *Lincoln Mills* and cannot be accepted." 379 U.S. at 656. Application of state law to the same question in contract suits arising under the Railway Labor Act would

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[2] This was, of course, the reason for the establishment by Congress in 1934 of the National Railroad Board of Adjustment under Title I of the Railway Labor Act and for the provision in Title II requiring air carriers and unions to establish system boards of adjustment. Under the scheme of the Act, disputes as to the interpretation or application of airline or railroad collective bargaining agreements are ultimately settled through arbitration by either the National Railroad Adjustment Board or, in the case of the airlines, by a system board of adjustment. Strikes are not permitted in connection with such disputes.

be equally incompatible with the precepts of *Central Airlines.*[3]

Although, as the Court indicated in *Maddox,* the decision in *Moore* noted the use of so-called "permissive" language in the Railway Labor Act with respect to referral of contract disputes to the National Railroad Adjustment Board (379 U.S. at 654), use of that language has no significance in this case. The so-called "permissive" language was germane in *Moore* only in the context of a belief that state law could govern suits on contracts covered by the Railway Labor Act.[4] In that context, it was pertinent to consider whether anything in the language of the Act itself specifically superseded state law on the issue of exhaustion of administrative remedies.

But now that *Central Airlines* has established that state law is inapplicable to employee suits for breach of

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[3] Other Federal courts also apparently regard the rationale of Maddox as applicable to cases arising under the Railway Labor Act. Neal v. System Board of Adjustment, 348 F. 2d 722, 727 (8th Cir. 1965); Wade v. Southern Pacific Co., 243 F. Supp. 307, 312 (D. Tex. 1965); Railroad Workers Unemployment Council v. B. & O. R.R. Co., 52 CCH Lab. Cases 23,596, 23,598-99 (S.D.N.Y. 1965); see also Beebe v. Union R.R. Co., 208 A.2d 16 (1965). These decisions appear to share the view expressed by Mr. Justice Black in his dissent in Maddox, that Moore and Koppal had, as a practical matter, been overruled. See 379 U.S. 667. It does not appear that any Federal court has held to the contrary. But *cf.* In re Certain Carriers, 53 CCH Lab. L. Rep. 16,533 (D.D.C. 1966).

[4] As in the case of the Labor Management Relations Act, nothing in the language of the Railway Labor Act expressly provides for or precludes the application of state law or rules regarding exhaustion of remedies to suits on collective bargaining agreements. Resolution of such questions is, therefore, more a matter of dealing with the interstices of the statute than with its language.

contract under the Railway Labor Act, it is clear that Federal law governs the question of exhaustion. The Federal rule, as enunciated in *Maddox,* requires exhaustion, at least with respect to contractual remedies and, unless a tenuous distinction is to be drawn, with respect to National Railroad Adjustment Board remedies as well.[5]

In any event, the so-called "permissive" language of the Act dealing with referral of contract interpretation disputes to arbitration is permissive only in the sense that railroads, airlines, unions, or individual employees each have the right, but are not compelled, to submit every contract interpretation dispute to an Adjustment Board. As a practical matter, this means only that they may resolve or abandon any dispute short of that step if they desire to do so. But any unresolved dispute which an aggrieved party does not voluntarily abandon must be submitted to an Adjustment Board, since there is no other way in which it can be resolved. Strikes over such disputes are unlawful and neither a union nor an employee convinced of the merit of a grievance is likely to accede to an employer's position without exhausting the statutory right to arbitration. For all practical purposes, therefore, the Act provides for compulsory arbitration of contract interpretation disputes.

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[5] A holding merely that a railroad employee must exhaust his *contractual* remedies would be fatal to petitioner in this case since he conceded that he neither exhausted his contractual remedies nor attempted to proceed before the National Railroad Adjustment Board. On the facts in this case, therefore, the Court is not compelled to reach the question of exhaustion of administrative remedies if it holds that petitioner was, at the very least, required to pursue the contract grievance procedure to its conclusion.

II. No Valid Reason Exists for a Different Federal Rule in This Case Than That Applied in Maddox.

Since *Central Airlines* makes it clear that Federal substantive law governs the rights of the parties to this dispute, the ultimate question here is whether the Federal rule governing exhaustion of remedies announced in *Maddox* is applicable or whether persuasive reasons exist for adopting a diametrically opposite Federal rule for Railway Labor Act cases, under which exhaustion would not be required. No basis exists for any such incongruity.

A. Nothing in the Nature of Petitioner's Claim Justifies a Departure from Maddox.

Petitioner urges first of all that there are important differences between his complaint and that involved in *Maddox* which warrant application of a different rule.[6] Petitioner argues that, whereas *Maddox* involved a suit for severance pay to which the plaintiff claimed he was entitled under the collective bargaining agreement, the petitioner here alleged breach of a provision of agreement regarding retention of seniority rights and claimed, as the measure of damages, lost wages to which he otherwise would have been entitled. Thus, petitioner insists, *Maddox* was a suit to require defendant "to perform" the agreement while the instant case is a suit for damages for alleged *breach* of the agreement.[7] Pet. Br. 10.

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[6] As petitioner puts it, "there is no conflict between the doctrine announced in *Moore* and *Slocum* and the doctrine set forth in *Maddox*." Pet. Br. 10.

[7] In this same connection, petitioner insists on classifying his case as a "wrongful discharge" case. Pet. Br. 10, 17, 20. Yet it is by no means clear that this case can be so classified. The precise issue was whether petitioner's seniority was properly terminated

This is a meaningless distinction. The suit in *Maddox* was necessarily based on a claim that the company had violated the contract by refusing to make the severance payment. Indeed, petitioner's characterization of the suit in *Maddox* is inconsistent with the language of Section 301(a) of the Labor Management Relations Act, which was the basis for jurisdiction in that case. Section 301(a) gives district courts jurisdiction of suits "for violation of contracts between an employer and a labor organization. . . ." That a district court was deemed to have jurisdiction of the *Maddox* case indicates that, at least so far as the Labor Management Relations Act is concerned, there is no distinction between suits "to perform" collective bargaining agreements and suits for damages for their breach.

On still another ground the distinction petitioner attempts to draw is illusory. The only difference between *Maddox* and the instant case is that in *Maddox* the asserted measure of damages was to be found in the contract itself whereas here determination of damages would involve consideration not only of the terms of the collective bargaining agreement but extrinsic evidence as well. But the mere fact that the measure of damages happens to be set forth in a contract is scarcely determinative of the issue here.

Petitioner's claim that the rationale of *Maddox* "is not in conflict with . . . *Moore* and *Slocum*"—*i.e.*, that because of differences in the nature of the claim, this

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under the collective bargaining agreement. This turns solely on interpretation of the agreement, to determine the proper method of measuring the 30-day period provided for in Article 25(e)(3). Unlike the situation in ordinary wrongful discharge cases, petitioner was not actively employed by respondent at the time his seniority was terminated and was, therefore, not discharged in the usual sense of the word.

Court would be justified in applying a different rule with respect to exhaustion of remedies than it applied in *Maddox*—is patently without merit.

B. DEPARTURE FROM THE FEDERAL RULE OF EXHAUSTION IS NOT NECESSARY TO ASSURE IMPARTIAL DETERMINATION OF RIGHTS.

In urging that a railroad employee should not be required to exhaust his contractual and administrative remedies, petitioner necessarily asks that the rationale of *Maddox* as a logical outgrowth of *Lincoln Mills* and *Central Airlines* be disregarded and that the policy considerations supporting *Maddox* be ignored. The asserted justification for this is that an exception to the general Federal rule of exhaustion is necessary to assure railroad employees an impartial forum for their grievances. Petitioner apparently assumes that a union or union-designated members of the National Railroad Adjustment Board will act unfairly in ruling on an employee's grievance and therefore that the employee must be free to proceed immediately to court. Both the assumption and the conclusion are unfounded.

First, mere speculation as to possible unfairness is hardly a basis for not requiring at least an attempt to exhaust contractual and administrative remedies. As the Court of Appeals noted, if any unfairness on the part of the union in its representation of an employee is shown, the employee has a judicial remedy. See 354 F.2d at 952. Moreover, in this case there was no evidence that petitioner's union acted unfairly. All that appears is that the union believed that petitioner's position lacked merit. There is, of course, a vast difference between this and unfairness or bad faith on the part of the union.

Even assuming *arguendo* that a union official had acted in bad faith in refusing to process petitioner's

grievance, petitioner could have done so himself and could, under Section 3, First (i) of the Act, have appealed, if necessary, to the National Railroad Adjustment Board. There is no reason whatever to suppose that either the union or railroad members of the Board would not have acted in good faith in ruling on the grievance. Indeed, the normal presumption is that they would.

Petitioner, at pages 14-16 of his brief, makes the further argument that he would have had no right of appeal to the courts if he had pursued his remedies before the National Railroad Adjustment Board and the Board had ruled against him. Although prior to June 20, 1966, the Railway Labor Act did not provide for judicial review of decisions of the National Railroad Adjustment Board denying relief sought by a union or an employee,[8] this does not aid petitioner's argument.

Petitioner is not entitled to be exempted from the requirement of exhaustion of remedies merely because exhaustion might have resulted in final denial of his grievance. Nor is petitioner's suggestion that members of the Board would act in bad faith a basis for arguing that statutory judicial review is a necessary pre-requisite to a requirement for exhaustion of administrative remedies. Putting to one side the wholly speculative nature of petitioner's supposition, it is plain that if members of the Board acted in bad faith in ruling against an aggrieved employee, the employee would have an adequate judicial remedy regardless of

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[8] Section 2(e) of Public Law 89-456, enacted on June 20, 1966, 80 Stat. 210, provides for limited judicial review of decisions of the National Railroad Adjustment Board denying relief sought by a union or by an employee. See page 26, *infra*.

the absence of statutory provisions for judicial review. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652 (1965); *Steele* v. *Louisville & N. R.R. Co.*, 323 U.S. 192 (1944).

Petitioner's fundamental position in this case seems to rest on the assumption that unions subject to the Railway Labor Act are less trustworthy than unions subject to the Labor Management Relations Act and are incapable of fairly representing their members. Not a shred of evidence supports this assumption. Moreover, even if petitioner's charges of unfairness were supported by evidence, they would hardly warrant the anomalous result urged by petitioner—namely, that state law should apply to questions of exhaustion of contractual and administrative remedies under the Railway Labor Act while Federal law applies to similar questions under the Labor Management Relations Act.[9]

C. THE SAME POLICY REASONS FAVOR EXHAUSTION HERE AS IN MADDOX.

The policy reasons advanced by this Court in *Maddox* when it declined to follow *Slocum, Moore* and *Koppal* and instead applied a Federal rule requiring exhaustion apply equally to this case. Indeed, the Court could have been speaking either of the Railway Labor Act or the Labor Management Relations Act when it said in *Maddox* —

> "Union interest in prosecuting employee grievances is clear. Such activity complements the

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[9] The absence of any logical connection between petitioner's argument and the ruling he urges upon the Court is further demonstrated by the fact that, even under the doctrine of Slocum, Moore and Koppal, failure to exhaust contractual and administrative remedies would bar a railroad employee's suit if that happened to be the applicable state law.

union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

"A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" 379 U.S. 650 at 653.

One theoretical reason for permitting common law actions for wrongful discharge without exhaustion of contractual or administrative remedies is that such an action does not involve questions of future relations between the railroad and its other employees, or that if it does, the decision will not constitute a binding precedent. *Cf. Slocum* v. *Delaware L.&W.R.R. Co.*, 339 U.S. 239, 244 (1950).

Yet this theory has no application here. In the instant case, the question of whether the termination

of petitioner's employment was wrongful turns entirely on interpretation of the 30-day provision contained in Article 25(e)(3) of the collective bargaining agreement. The question is how, in the context of the railroad industry, time is to be computed under such a provision. Specifically, should the first day of such a period be included and the last excluded, or should the first day be excluded and the last included? R.23. Or might there be still another proper interpretation of this provision as applied to the facts here? There cannot be the slightest doubt that the resolution of such questions would have a significant effect on future relations between the railroad and its other employees.[10] It is likewise idle to suppose that a court decision on such a question would not be regarded as a compelling precedent.

Apart from this, there is even greater justification here for application of the Federal rule requiring exhaustion. In this case, the understanding and custom of the industry were of paramount importance to a proper construction of the somewhat unusual language employed in the collective bargaining agreement (R.29), and in the correspondence between respondent's superintendent and petitioner. R.5. Obviously the National Railroad Adjustment Board would have been uniquely well qualified to pass upon the questions involved. Even the District Court below recognized that the railroad jargon was unusual and that the Board could have served an important purpose in this regard. See also the opinion of the court below (354 F.2d at 952) and *Slocum v. Delaware L.&W. R.R. Co.*,

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[10] Indeed, the resolution of such questions could lead to a demand by either the railroad or the union for a modification of the language of the collective bargaining agreement.

supra.[11] In such a case there is just as much, if not more, reason for requiring exhaustion of remedies than there was in *Maddox* on the issue of severance pay.

D. THE NATURE OF ADJUSTMENT BOARD PROCEDURES AND REMEDIES DOES NOT WARRANT A DEPARTURE FROM THE MADDOX RULE.

In footnote 14 of the decision in *Maddox*, the Court said:

> "By refusing to extend *Moore* v. *Illinois Central R. Co.* to § 301 suits, we do not mean to overrule it within the field of the Railway Labor Act. Consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of the administrative remedies provided by that Act can be appraised in context, *e.g.*, the make-up of the Adjustment Board, the scope of review from monetary awards, and the ability of the Board to give the same remedies as could be obtained by court suit." 379 U.S. at 657.

The administrative procedures and remedies provided by the Railway Labor Act do not differ significantly from those under any collective bargaining agreement establishing arbitration as the means of resolving disputes about interpretation of the agreement.

The Adjustment Board is divided into divisions according to type of craft. Each division is composed

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[11] In Slocum the Court said:

> "The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. [Footnote omitted.] Long and varied experiences have added to the Board's initial qualifications." 339 U.S. at 243.

equally of representatives of management and organized labor. The procedures for the settlement of disputes which reach the Adjustment Board are not specified in minute detail but are set forth generally in Section 3, First (i), (j), (k), (l), (m), (n) and (o) of the Act. They provide, *inter alia,* that either an employee, a group of employees or a carrier may refer a dispute to the Adjustment Board.

Parties may be heard in person, by counsel, or by other representatives. Due notice of hearings is required. Any division of the Adjustment Board can delegate authority to two or more of its members to conduct hearings and make findings, but final awards must be by the entire division. Awards must be in writing and must be furnished to the respective parties. The Board has authority to interpret its own awards.

The Board may decide cases by majority vote of the division involved. Most importantly, if a division of the Board fails to agree on an award because of inability to secure a majority vote, a neutral person must be designated to sit with the division as a member and make an award. The make-up of the Adjustment Board is thus, in the final analysis, equivalent to any arbitration tribunal in which the power of decision is given to an impartial third party.

In keeping with the high degree of flexibility of arbitration procedures generally, see Updegraff & McCoy, *Arbitration of Labor Disputes,* 182 (2d ed. 1961); Beatty, *Labor Management Arbitration Manual,* 51, 53, 57 (1960); Sturgis, *Commercial Arbitration and Awards,* 422-519 (1930); Trotta, *Labor Arbitration,* 96-109 (1961), the Adjustment Board has established by regulation only general procedures to be followed. *Cf.* 29 C.F.R. 301.1-301.9. Indeed, the Adjustment

Board appears to vary its procedures with the requirements of the case before it. The flexibility of the Board's procedure is illustrated in *Gunther* v. *San Diego & A.E. Ry. Co.*, 382 U.S. 257 (1965), in which the Court upheld appointment by the Board of three physicians to decide for it a question of fact about an employee's physical condition.

Beyond this, the Board avoids technical legal language and procedures, is flexible in its choice of remedy and is not bound by common law rules of evidence. See CCH Lab. L. Rep. ¶ 5675 at 11,255-59 (1966); Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency,* 46 Yale L.J. 567 (1937). In so proceeding, the Adjustment Board carries out the Congressional mandate expressed in Section 3 of the Railway Labor Act. As the Court said in *Gunther,* Congress

> "invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, acting on the Adjustment Board with their long experience and accepted expertise in this field." 382 U.S. 257 at 261-62.

Finally, the Adjustment Board can give at least the same remedies as can be obtained by a court suit. Indeed, no express limitation is imposed by the Act on the type of remedy that may be ordered by an Adjustment Board, and money awards are expressly provided for in Section 3, First (o) of the Act. 48 Stat. 1189, 1192 (1934); 45 U.S.C. § 153 (1965). If anything, an Adjustment Board may grant an even broader remedy than a court. The Adjustment Board has exclusive

primary jurisdiction in any breach of contract case in which an employee seeks reinstatement. *Cf. Slocum* v. *Delaware L.&W. R.R. Co.* and *Moore* v. *Illinois Central R.R. Co., supra.*

With respect to the scope of judicial review, this Court has already ruled, in *Gunther,* that Adjustment Board decisions have "the same finality that a decision of arbitrators would have." 382 U.S. at 263. Indeed, prior court decisions had so indicated. Compare *Textile Workers* v. *Lincoln Mills, supra* and *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960), with *Brotherhood of R.R. Trainmen* v. *Chicago River & Ind. R.R. Co.,* 353 U.S. 30 (1957); *Union Pacific R.R. Co.* v. *Price,* 360 U.S. 601 (1959); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R. Co.,* 373 U.S. 33 (1963).

Prior to the enactment of Public Law 89-456 on June 20, 1966, the Railway Labor Act limited the finality of money awards and made decisions of the Adjustment Board prima facie evidence of the facts in judicial review proceedings. Sections 2(a), (c), (d) and (e) of Public Law 89-456 eliminated the limitation of finality in cases involving money awards and substituted for the "prima facie evidence" language words making the findings and order of the Adjustment Board "conclusive on the parties" and further limited the scope of judicial review by providing that Adjustment Board orders may not be set aside except for

> "failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

Legislative action subsequent to *Gunther* has thus reinforced the Court's decisions which limited to approximately the same degree the scope of judicial review of decisions of labor arbitrators generally and decisions of the Adjustment Board.

In summary, nothing in the administrative remedies provided under the Railway Labor Act warrants application of *Moore* and *Koppal* rather than *Maddox* to cases arising under the Railway Labor Act. If anything, the similarity of the administrative remedies provided for by the Railway Labor Act to customary arbitration procedures indicates that the principle of *Maddox* is equally applicable to Railway Labor Act cases.

III. The Decision Below Does Not Deprive Petitioner of Any Constitutional Right.

Petitioner also appears to assert two constitutional arguments in support of his position. Specifically, he suggests that the effect of the decision below is to deny him equal protection of the laws and to deprive him of a right to trial by jury.

Neither argument was raised in the court below nor suggested in the petition for certiorari. Accordingly, neither is properly before this Court. Supreme Court Rule 40-1(d) (2); *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 428 (1964); *Carpenters & Joiners* v. *NLRB,* 357 U.S. 93, 96 n.1 (1958).

Even assuming that these arguments had been timely, however, both are clearly without merit. The equal protection argument rests on a completely erroneous factual premise—that the right of an employee to obtain judicial review of an order of the National Rail-

road Adjustment Board is relatively narrow, whereas an employer may appeal an adverse Adjustment Board decision to the courts and secure a trial *de novo*.

While the Railway Labor Act was for a time open to such a construction, this Court made clear in the *Gunther* case that no such disparity exists between employer and employee as respects their right to judicial review. Moreover, as indicated above, Congress recently amended the Railway Labor Act to eliminate even the *appearance* of such a disparity. Thus, P.L. 89-456 inserted a new paragraph "(q)" in Section 3, First, of the Railway Labor Act, providing in part as follows:

> "If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggreived by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees, or carrier may file in any United States District Court in which a petition under paragraph (p) could be filed, a petition for review. . . ."

In short, the rights of employee and employer to judicial review under the Railway Labor Act are today precisely the same and no basis whatever exists for an equal protection attack on the decision of the court below.

Petitioner's reliance on the Seventh Amendment is equally misplaced. The Seventh Amendment guarantees that the right to trial by jury shall be preserved in suits at common law and also restricts the power of Federal trial and appellate courts to overturn jury factual determinations. But the Seventh Amendment

does not preclude either state legislatures or the Congress from doing away with common law actions altogether and substituting therefor administrative proceedings which otherwise satisfy the requirements of due process. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *Rowlette* v. *Rothstein Dental Lab., Inc.*, 63 F.2d 150 (D.C. Cir. 1933), *cert. denied*, 289 U.S. 736 (1933). See also *New York Central R.R. Co.* v. *White*, 243 U.S. 188, 200, 202 (1917), *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, 234, 235-40 (1917), and *Voehl* v. *Indemnity Ins. Co.*, 288 U.S. 162, 166 (1933), which this court cited in its order denying certiorari in the *Rowlette* case.[12]

It follows *a fortiori* that to require petitioner to exhaust his contractual and administrative remedies before seeking judicial vindication of his claim does not deny him any Seventh Amendment right.

IV. No Basis Exists for a "Prospective" Decision in This Case.

By emphasizing in his brief that this Court did not hand down the *Maddox* decision until "eight days" after the District Court's entry of judgment (Pet. Br. 4, 10),[13] petitioner appears to argue that even if the Court of Appeals correctly applied the rationale of *Maddox* here, that court nevertheless erred in reversing

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[12] The denial of certiorari in Rowlette, a case raising a strikingly similar Seventh Amendment issue as that raised here, is of particular significance in view of the extraordinary action of the Court in citing authority in its order, thereby disclosing the basis for its ruling.

[13] Maddox in fact followed the District Court entry of Judgment by seven days; the respective dates were January 25 and January 18, 1965, as petitioner correctly notes.

the District Court because "the District Court had a right to enter Judgment for . . . [petitioner] on January 18, 1965." Pet. Br. 4.

This argument is wholly fallacious. Assuming for a moment that *Maddox* is the case that "overruled" the doctrine of *Moore* and *Slocum,* it does not follow that, because the District Court entered judgment prior to the *Maddox* decision, the Court of Appeals should have declined to follow *Maddox.* The well-established rule is that an intervening change in the law due to the overruling of a prior decision must be applied and given effect even when to do so requires reversal of a lower court decision indisputably correct when rendered. *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538 (1941).

Of course it is equally logical to view *Central Airlines* as the case which "overruled" *Moore, Slocum,* etc. Under such an analysis it is unnecessary even to invoke the *Vandenbark* doctrine in support of the Court of Appeals' decision, for *Central Airlines* was handed down by this Court in April 1963, four months before the instant suit was even filed.

And if one puts aside entirely these somewhat metaphysical concepts and assumes that the instant case, not *Maddox* or *Central Airlines,* will deliver the *coup de grace* to *Moore, Slocum,* etc., still the decision of the Court of Appeals was obviously correct. Petitioner can hardly question the power of a court to disregard prior decisions, which have plainly lost their vitality, and make its action effective in the case in which such action is taken.

On rare occasions this Court has—in the limited field of criminal law and where the public policy

reasons for so doing were deemed overwhelming—refused to apply the precedent or *stare decisis* effect of a case retroactively. See, *e.g., Linkletter* v. *Walker,* 381 U.S. 618 (1965); *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

But in no case has the Court declined to apply the rule of a case to the specific controversy giving rise to *that* case. For this reason, as well as because no significant countervailing public policy considerations are present, there could be no possible justification for the Court's overruling *Slocum, Moore* and *Koppal* in the field of the Railway Labor Act while declining to apply its rule to the controversy now before it. Indeed, petitioner's delay of approximately six years in instituting a court proceeding scarcely provides a basis for any claim of inequity or justifies being rewarded by extraordinary action on the part of this Court.

Accordingly, it is clear that the brief time lag between the District Court's entry of judgment on the instant case and this Court's decision in *Maddox* in no way casts doubt on the propriety of the Court of Appeals' decision, which faithfully reflects the trend of decisions in this Court, beginning with *Lincoln Mills,* continuing with *Central Airlines,* and given effect most recently in *Maddox.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed. If, however, the Court were to reach the opposite conclusion, it is plain that the disposition of the damage issue urged in petitioner's brief (Pet. Br. 18-20) would be improper. Respondent's position on the issue of damages was not even

considered by the Court of Appeals since it did not reach that issue. The issue could not have been, and was not, raised in the petition for certiorari. It is therefore not before this Court. Supreme Court Rule 40-1(d) (2) and cases cited on page 25, *supra*.

Respectfully submitted,

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October 1966

APPENDIX

(Defendant's Exhibit No. 4—Letter dated August 23, 1957, from L. G. Tolleson to R. L. McCollum)

August 23, 1957 fd
LF-6-W-57

Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen,
First National Bank Building,
Tuscumbia, Ala.

Dear Sir:

On March 3, 1957, R. E. Walker, who was working as yard fireman on 3:00 p.m. to 11:00 p.m. assignment at Air Line Junction, Charlotte, N. C., was notified that he had been displaced by another fireman through exercise of seniority. Mr. Walker did not then place himself on another assignment, mark up for any other service or request permission to be off, but simply elected to absent himself without proper leave.

When the matter was brought to the attention of Division Superintendent Brosnan, he wrote Walker at his Forest City, N.C. address on April 29, 1957, advising him that he stood for work and that unless he protected his seniority standing within thirty days from April 29, he would forfeit his seniority. Receipt of the letter was acknowledged on April 30 on the prescribed post office form, the letter having been sent by certified mail.

On May 29, at 2:45 p.m., Walker reported to the yard office at Charlotte, but was not permitted to mark up, inasmuch as he had not complied with the Superintendent's notice to report within thirty days from April 29.

On May 30, Mr. Brosnan again wrote Walker, referred to the previous letter dated April 29, and advised him that his name had been stricken from the seniority list and that he was no longer considered an employee of the Southern Railway Company. At 4:30 p.m. that same date, Walker discussed his case with Superintendent Brosnan personally

at Greenville, at which time Walker admitted he had failed to protect his seniority within the prescribed time limit. During this discussion with the Superintendent, Walker also indicated he had been off sick and in the hospital for an operation during March and that his daughter had reported this to the Company by long distance telephone call; however, the Superintendent's staff advises they have no record or knowledge of such a call having been received. Mr. Brosnan declined to change his decision in the matter.

On June 24, 1957, the Superintendent received a statement dated June 18, 1957 signed by Dr. T. R. Harris of the Gardner-Webb Community Health Center, Boiling Springs, N. C., copy of which is attached, concerning Walker's physical condition. Your attention is called to the fact that Dr. Harris gives a history which I believe you will agree anyone will interpret as meaning that Walker was unable to work during the period he was off.

In the light of the circumstances related above, will you please advise promptly what your position is with respect to this matter, i.e., whether Walker has forfeited his seniority because of his failure to report for work in conformity with notice served on him by the Superintendent, or whether his name should be restored to the seniority roster in view of the evidence he has produced from his doctor that he was under doctor's care during the period in question.

Very truly yours,

(S) L. G. Tolleson
L. G. Tolleson
Director of Labor Relations

(Defendant's Exhibit No. 5—Letter dated September 16, 1957, from R. L. McCollum to L. G. Tolleson)

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN
SOUTHERN RAILWAY SYSTEM

First National Bank Building
Tuscumbia, Alabama

R. L. MCCOLLUM
GENERAL CHAIRMAN

September 16, 1957

Mr. L. G. Tolleson
Director of Labor Relations
Southern Railway System
Washington 13, D. C.

Dear Mr. Tolleson:

Referring further to your letter of August 23, 1957, concerning the seniority of Fireman R. E. Walker, Charlotte Division North. Your File LF-6-W-57.

This matter was discussed with you while in Washington September 11. You requested that I write you concerning my position in this matter. As I explained to you in conference, it does not matter with the Organization whether this man is returned to service or not. However, the record indicates that Fireman Walker was displaced on March 3. After being away from the service approximately 47 days, Superintendent Brosnan notified Mr. Walker that he would be required to return in 30 days or his name would be removed from the seniority list. Mr. Walker did not return within the 30 days and his name was subsequently removed from the list.

It seems Fireman Walker absented himself from service without proper leave and has forfeited his seniority. However, he did produce a doctor's statement that he was under the doctor's care during this time. Regardless of this, it did not prevent him from notifying Superintendent Brosnan at least during the 30 day period he was given to return to service. Article 26(g)(3) of the firemen's agreement provides, "Firemen, hostlers and outside hostler helpers who voluntarily leave the service will rank as new

men if reemployed". It also seems that any claim Fireman Walker might have is barred from further handling by Article 32(b) of the firemen's agreement. He did not handle his case as therein required with Superintendent Brosnan, nor did he process same to the next ranking officer.

Considering the circumstances in this case and the Claimant's previous record, it would appear that the best action to take would be to let the matter rest as it is with Fireman Walker's name removed from the list.

Very truly yours,

(S) R. L. McCollum

R. L. McCollum

RLM:wc

(Article 32 of Collective Bargaining Agreement between Southern Railway Company and Brotherhood of Locomotive Firemen and Enginemen)

ARTICLE 32

REPRESENTATION AND ADJUSTMENT MATTERS

(a) REPRESENTATION

The right of any engineer, firemen, hostler or outside hostler helper to have the regularly constituted committee of his organization represent him in the handling of his grievances, under the recognized interpretation placed upon the schedule involved by the officials of the Company and the general committee making the same, is conceded.

(b) GRIEVANCES

(1) No grievance will be entertained unless presented in writing to the Superintendent within sixty day after its occurrence by the fireman, hostler, outside hostler helper or the committee of his choice. Firemen, hostlers, and outside hostler helpers shall have the right to appeal to the next ranking officer, provided such appeal be made in writing within sixty days after the Superintendent has rendered his decision to the fireman, hostler, outside hostler helper or the local committee representing him.

(2) The word "grievance" as used in paragraph next above refers to and covers all matters arising under schedule rules including, but not limited to, matters such as discipline and time claims. To be entertained must be presented in writing to Superintendent within sixty days after its occurrence, and, in event adjustment be requested which involves a money payment, the period covered by such adjustment cannot antedate a date sixty days prior to the date upon which such claim is filed.

(3) Claims involving time payments in other than discipline cases shall be deemed to have been filed when a time ticket is filed with the Superintendent or other proper officer to whom such time tickets are sent by employees involved. If declined by Superintendent, must be further handled or appealed in writing within sixty days. If not handled or so appealed within such sixty days, further handling is barred.

(4) Appeals, to be recognized under the statute of limitation rule, must be made in writing within sixty days from the date of final decision by any officer to whom an appeal has been made to the next ranking officer to whom appeal is to be made until such appeal reaches the highest ranking officer authorized to pass on such appeals. If not so appealed, further handling is barred.

(5) When erroneous over-payments are made, no retroactive adjustments will be made for a period of more than sixty days prior to the date such erroneous payments are discovered and employees notified that such adjustments are to be made.

NOTE: Section (b) effective August 1, 1944.

(c) COMMITTEES

Properly constituted committees of firemen or hostlers desiring to present any matter to any proper official, will be granted leave of absence as soon as possible after application has been made.

(d) DISMISSAL FOR COMMITTEE WORK

No fireman or hostler will be dismissed from the service of the Company for serving on an adjustment Committee.